

Having reviewed the entire evidentiary file contained herein, the Board finds the Post-Award Medical Award of the ALJ should be affirmed.

Claimant suffered injury to her low back in April of 1980 while lifting a patient. Since that time, she has undergone six separate surgeries to her low back, with the most recent being under the hand of Paul M. Arnold, M.D., a neurosurgeon at the University of Kansas Medical Center. The medical record on claimant covering the various treatment modalities provided is extensive. The earliest mention of any type of water therapy discovered in this record is a note referring to a prescription from one of claimant's original treating physicians, Alan L. Kruckemyer, M.D., in November of 1981, when he recommended claimant attend a swim exercise class.

Claimant has been involved in aqua therapy for many years, with respondent paying for the aqua therapy for the last several years. In January of 2005, respondent notified claimant by letter that it would no longer be responsible for the aqua therapy. This decision was made irrespective of the fact that there was an Order in the file from May of 2004 wherein the court specifically authorized the aqua therapy. That Order has never been modified and remains in force.

Claimant testified that as a result of her most recent surgery and the aqua therapy, she can walk better, she functions better, she does not utilize as much pain medication and, between the therapy and the surgery, she has been able to leave her wheelchair.

Additionally, in this record, there are several opinions provided by health care providers regarding the benefits of claimant's ongoing aqua therapy. Dr. Arnold, who performed the surgery on claimant's low back on November 12, 2003, advised claimant that he wanted her to continue with the aqua therapy. James A. Stuckmeyer, M.D., a board certified orthopedic surgeon, who performed an independent medical examination of claimant at the request of her attorney, while acknowledging the aqua therapy will probably not improve claimant, did recommend the continued aqua therapy, as it afforded claimant some relief from her pain and he determined it was a reasonable approach to both pain relief and allowing claimant to manage her current level of functioning. Chris D. Fevurly, M.D., a physiatrist, evaluated claimant on February 25, 2005, at respondent's request. Dr. Fevurly also felt that continued participation in the aqua therapy was appropriate in order to enhance and maintain claimant's level of functioning. The ALJ determined, and the Board agrees, that claimant derives palliative benefit from the participation in the aqua therapy.

K.S.A. 1979 Supp. 44-510(a) requires the employer to provide the services of a physician "as may be reasonably necessary to cure and relieve the employee from the effects of the injury." It is obvious after six surgeries and 25 years of ongoing difficulties, claimant's condition is not going to be cured by anything so basic as aqua therapy. However, the statute is not limited to treatment that cures; it also allows treatment to relieve an employee of the effects of the injury. In this instance, claimant's testimony is uncontradicted that the aqua therapy both helps relieve her pain and helps her maintain her mobility. The Board, therefore, finds, as did the ALJ, that it is reasonable and necessary to continue with the aqua therapy at the expense of respondent. The

Post-Award Medical Award of the ALJ in that regard is affirmed. The Board notes that instructing or encouraging employers to violate an employee's right to medical benefits can constitute a fraudulent or abusive act under K.S.A. 44-5,120. A wiser practice would be to obtain an Order discontinuing the earlier ordered treatment.

Respondent also argues that claimant should cease the utilization of her ongoing narcotic medication.

At the post-award hearing before the ALJ, held April 5, 2005, claimant's attorney advised that respondent had apparently contacted both claimant and Sara L. Johnston, M.D., claimant's current treating physician (the physician providing claimant's ongoing prescription medication), notifying them that it would no longer authorize the medication. At the hearing, claimant's attorney advised respondent's attorney that the May 11, 2004 Order authorized Dr. Johnston and Dr. Arnold as the treating physicians. The ALJ noted that respondent cannot unilaterally discontinue ordered medication without an order from the court. However, the ALJ also noted in the Post-Award Medical Award that while respondent threatened to discontinue claimant's medication, it had not at the time of the Post-Award Medical Award followed through on that threat. The ALJ, therefore, determined that the issue of whether claimant should undergo inpatient substance abuse to wean her from this long-term dependence was not an issue "squarely before the court,"¹ and the ALJ made no determination on that issue at the time of the Award.

The Workers Compensation Board is a creation of statute. K.S.A. 44-555c limits the Board's review to questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.² The Board does not have original jurisdiction on issues in workers compensation litigation, but instead rules on appeals from determinations of administrative law judges. As the ALJ made no determination with regard to that issue, the Board has nothing to review. The Board, therefore, will not take jurisdiction over that issue until such time as the appeal to the Board is ripe.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Post-Award Medical Award of Administrative Law Judge Bruce E. Moore dated July 20, 2005, should be, and is hereby, affirmed.

¹ Post-Award Medical Award at 5.

² K.S.A. 44-555c(a).

IT IS SO ORDERED.

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director